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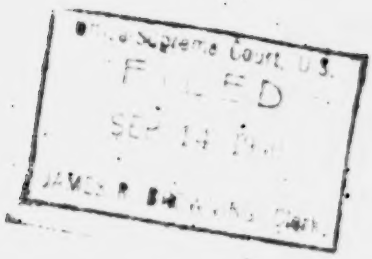

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 415

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Petitioner

v.

JAMES EARSTON WILES

PETITION OF THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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2900 Grant Building
Pittsburgh 19, Pa.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, The New York, Chicago and St. Louis Railroad Company, respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit reversing an Order of the United States District Court for the Western District of Pennsylvania which set aside a jury's award of $20,000 for loss of future earning capacity.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania (not officially reported) is included in the record filed in the Court below

at pages 6a to 14a, the material portion thereof appearing at pages 11a to 14a. The opinion of the United States Court of Appeals for the Third Circuit is reported at F. 2d. ——, (rehearing denied without opinion) and a copy thereof is appended hereto in Appendix A, pages 11-18, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed is dated and was entered of record on June 21, 1960.

A Petition for Rehearing was filed within the prescribed period and was denied without opinion by the Court below on July 18, 1960.

Jurisdiction to review the judgment of the Court below by Writ of Certiorari is conferred upon this Court by 28 U.S.C.A. § 1254 (1).

STATUTE INVOLVED

45 U.S.C.A. § 51, Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow

or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

QUESTION PRESENTED FOR REVIEW.

Where, following an injury and surgical treatment, an employee has returned to his former occupation, and is able to perform the duties of that occupation, and has been promoted and otherwise normally progressed to jobs at higher pay at that employment, and where the employee's medical expert has testified that the employee has no disability which would interfere with his working, may a jury by special verdict award that employee $20,000 for loss of future earning power based solely upon the same doctor's statement that he might not be able to get a job in heavy industry because a

physical examination would reveal that he had had a back injury and "they would not accept him if they could get someone that did not have a previous back injury"?

STATEMENT OF THE CASE

1. This action was originally instituted under the provisions of The Federal Employers' Liability Act, Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404; 45 USCA, § 51.

2. In December, 1953, respondent allegedly sustained the injuries for which he brought his action under The Federal Employers' Liability Act.

3. Respondent was off work from February 23, 1954 until July 31, 1954, during which time he had a laminectomy performed on his back.

4. He returned to his former employment where he worked continuously until April 16, 1957.

5. He was off work from April 19, 1957 until March 10, 1958, during which time he had a fusion perfomed on his back and his coccyx removed.

6. He returned to work on March 11, 1958, has worked continuously since that date, and has been promoted and is progressing in his employment in the usual manner.

7. Respondent testified at the trial that since his return to work, although he is skeptical of his back (40a) he has been able to do his work and his back is fairly good and doesn't bother him in his work. (42a)

8. Respondent's medical expert, Doctor Philip A. Faix, gave the only testimony relating to respondent's

loss of future earning power. (12a) In all material respects it is as follows: (12a-14a, pages 16-17 infra)

(Emphasis supplied)

"DIRECT EXAMINATION . . .

"Q. Are you familiar with the physical qualifications established by heavy industry, in the area for employment? (116a)

"A. Yes, I am.

"Q. . . . But in your opinion, Doctor, in the future should he cease his employment with the Nickel Plate Railroad and were he to seek employment elsewhere, in your opinion would he be qualified or pass a physical examination for such employment in heavy industry?"

* * * * * *

"A. I believe that you would have to do some explaining before you answered this question. No. 1, with the history of disk protrusion and back fusion, *generally* you get word from the employer that he would not want to accept this back or this case on history alone. Then, we come up to the physical properties, *where I might have some judgment,* but I think that that would—I mean they would not accept him if they could get someone that did not have a previous back injury. Let's put it that way. I think that is the fairest thing that I could say, to cover the problem." (117a)

"CROSS EXAMINATION . . .

"Q. Would you say that Mr. Wiles is disqualified to perform the services in all thirty of those job classifications, thirty or more? (118a)

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"A. I said I tried to be fair about this. If he came as a new employee, with this history, I *doubt* if he would be accepted.

"Q. You doubt it. But you don't say that he would be physically disqualified?

"A. No, I didn't say that." (119a)

"RE-DIRECT

"Q. Doctor, do you feel that the operative procedures that he has undergone have resulted in a disability in his back, of however minor a nature? (123a)

"A. Well, there isn't anyone who would say that anything that is repaired is as good as it was originally. . . . And there is, by the very nature of these things, naturally, some disability. But the fact that the man has returned to his work and is working comfortably, I *don't see that that disability carries into his working field.*"

On this record, the District Court submitted the following interrogatory to the jury:

"What amount, if any, have you awarded plaintiff for future loss of earning power?" (160a)

Answer: "$20,000.00" (166a)

The District Court set aside this award (14a) and the Court of Appeals reversed the District Court and reinstated the award. (18, infra)

It is to review this action of the United States Court of Appeals for the Third Circuit that your Petitioner asks that a Writ of Certiorari be issued to said court.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision of the United States Court of Appeals for the Third Circuit so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The exercise by this Court of its power of supervision in this case will touch upon ALL personal injury litigation in which prospective damages are sought. What *quantum* of proof is necessary to support a jury verdict for loss of future earning power?

To condone the action of the Court below would be to authorize, in all future pertinent litigation, a speculation hitherto uncountenanced in our system of jurisprudence.

Respondent, here, is a mechanic who returned to his original duties following somewhat extensive medical treatment. He, at this time, is about forty years old and has accumulated eight years seniority. Practical experience dictates that he is *unlikely* to forgo the benefits which have accrued to him with the railroad to start anew at the bottom of some other seniority roster.

A mechanic is a universal classification. There is nothing in the record to support an inference that respondent is uniquely trained for work in heavy industry, nor that he would likely seek employment in heavy industry, if he were to quit his employment with the railroad.

There is nothing in the record to support an inference that all heavy industry or, for that matter, that

any other industry would deny respondent a job if he were to quit his employment with the railroad. On the contrary, the testimony (incompetent although it is (117a)) at most merely suggests that *some* employers in heavy industry *might* deny respondent a job *if* other applicants were also seeking the same job (117a)

There is no evidence in the record or any testimony from any witness that plaintiff is likely to seek other employment of any kind at some unknown time in the uncertain future. Any such inference is nullified by the very fact of his present employment, and to accept such inference would lead to unlimited conjecture.

There is no testimony in the record that respondent has ever applied or has any intention of applying for employment elsewhere or that he would be physically unqualified for other employment in the future.

There is no testimony in the record to support an inference that, if he were denied employment in heavy industry, he would be unable to earn as much or more as a skilled mechanic in some other employment, which he would be required by law to seek in mitigation of his damages.

There is nothing in the record to support the disputed finding of the Court that ". . . he can't find employment elsewhere . . . " or that ". . . he is chained to his present employment in a kind of economic servitude." (page 17 infra)

There is nothing in the record on which the jury could intelligently assess the monetary difference between what plaintiff would have been able to earn in the future had he not been injured and what he will be

able to earn in his present physical condition (14a) which does *not* interfere with his working capability. (123a)

The questionable "fact" that a man *might not* be able to obtain a certain kind of employment within a limited field in the future, without *some* showing that he had previously contemplated seeking such employment, or at least would be likely to seek it, cannot support an award for loss of future earning power.

If the action of the Court below is permitted to stand, it is submitted that our courts will be confronted with not only unrealistic claims but also with unrealistic litigation subjecting employers to unlimited liability based on pure conjecture.

Congress may have intended that a railroad employee should be given the benefit of the doubt with respect to the responsibility for his injuries, but nowhere in the Federal Employers' Liability Acts is there any indication that the "injury" sustained can be shown otherwise than in the manner long adhered to in our courts.

In view of the recent trend of decisions of this Court which has all but eliminated the *proof of negligence* in Federal Employers' Liability Acts cases, your petitioner respectfully submits that this Court ought not also eliminate the required *proof of damages* in such cases. The burden upon the railroads of such a course would be beyond vision or imagination.

WHEREFORE, your Petitioner, The New York, Chicago and St. Louis Railroad Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which reinstated the award of $20,000 for loss of future earning power.

And it will ever pray, etc.

CHARLES MONROE THORP, JR.
Counsel for Petitioner

CLYDE A. ARMSTRONG
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THORP, REED & ARMSTRONG
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,991

JAMES EARSTON WILES

v.

THE NEW YORK, CHICAGO and ST. LOUIS RAILROAD COMPANY, a Corporation, *Appellant.*

No. 13,033

JAMES EARSTON WILES, *Appellant,*

v.

THE NEW YORK, CHICAGO and ST. LOUIS RAILROAD COMPANY, a Corporation

Appeals From the United States District Court for the Western District of Pennsylvania

Argued February 16, 1960

Before BIGGS, *Chief Judge* and STALEY and HASTIE, *Circuit Judges*

Opinion of the Court

(Filed June 21, 1960)

By BIGGS, *Chief Judge.*

This is an action brought under the Federal Employers Liability Act, 45 U.S.C.A. § 51 *et seq.* resulting in an award of $10,000 for the plaintiff. The jury also awarded $20,000 for loss of earning power, but the court set aside this portion of the verdict. Both sides have appealed from the judgment of the court below. Wiles, the plaintiff, an employee of the defendant Railroad, has alleged that he received serious back injuries re-

quiring three operations, including a laminectomy, when a jack which he was using to raise a hopper car, belonging to the Railroad, slipped, and, according to his testimony, threw him some fifteen feet. Wiles' superior, Ertle, with whom Wiles was working, died prior to the trial, so we do not have the advantage of his testimony. Wiles testified that after the jack slipped, he marked it with yellow chalk in accordance with the Railroad's rule so that it would be repaired. The Railroad kept no record of defective tools and therefore it could not inspect the jack after receiving Wiles' claim nor could the jack be produced at the trial. The rules of the Railroad required any of its employees who had received injuries in the course of their employment to report such injuries immediately to the Company on a form supplied by it. Wiles admits that he did not make such a report but asserts that at the time he did not consider that the accident had caused him any serious injury.

The evidence given by Wiles as to his alleged injury was conflicting and much has been made of this by the Railroad both in oral argument and on its brief but in our opinion there was sufficient evidence to permit the case to go to the jury on the issue of the Railroad's negligence. It was the duty of the jury to resolve the conflicting testimony and it did so in favor of Wiles.

There also has been much contention between the parties as to whether the doctrine of *res ipsa loquitur* does or does not apply under the circumstances at bar.[1]

---

1. At a pretrial conference Wiles was of the view that the application of the doctrine of *res ipsa loquitur* was essential to his case. In effect he informed the judge conducting the pretrial proceedings that he would rely on the doctrine.

Wiles testified that when he attempted to raise the hopper car by the jack, its stem or ratchet gave way. If this did occur, as the jury found it did, it was because of a defect within the covering of the jack and therefore not discernible unless the jack was disassembled and its parts inspected. Since the jack was under the defendant's exclusive control and since properly used jacks do not slip, Wiles asserts that the doctrine of *res ipsa loquitur* is applicable. The Railroad insists that the doctrine is not available to Wiles because his failure to notify it of the accident prevented the Railroad from finding the jack. It follows, asserts the Railroad, that the policy underlying the doctrine of *res ipsa loquitur*, namely that the chief evidence of the true cause of the accident is accessible to the defendant but inaccessible to the injured person, would not be served by permitting Wiles the use of the doctrine here.[2]

The classic exposition of the doctrine of *res ipsa loquitur* in the federal law, applicable here, is set out in San Juan Light & Transit Co. v. Requena, 224 U.S. 89, 98-99 (1912), wherein the Supreme Court stated: "[W]hen a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." See also Jesionowski v. Boston & Maine R.R., 329 U.S. 452 (1947). It is clear that under the circumstances of this

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2. See 38 Am. Jur., Negligence, § 299; Milom v. New York Central R. R. 248 F.2d 52 (7 Cir. 1957), *cert. den.*, 355 U.S. 953 (1958).

case Wiles ordinarily would be entitled to the inference of negligence afforded by the *res ipsa loquitur* doctrine since the jack and its internal mechanism were under the Railroad's exclusive control and the accident was not one which would ordinarily occur in the absence of negligence. The Railroad's contention that Wiles' failure to report the accident immediately denied it the opportunity to inspect the jack and thus rebut the inference of negligence is unsound because Wiles immediately notified the Railroad of the defective tool, even though the accident was not reported for some months. Admittedly, the Railroad might have been in a better position if Wiles had reported the accident immediately, but Wiles testified that he did not realize that he was injured at the time of the accident and the jury apparently believed this testimony. Wiles may not be barred from the benefit of the *res ipsa loquitur* doctrine by a kind of "estoppel" asserted here by the Railroad. The principle of Milom v. New York Central R.R., 248 F.2d 52 (7 Cir. 1957), *cert. den.* 355 U.S. (1958), is not applicable here for in that case the employee failed to report the accident even though he knew he had sustained serious injuries. We conclude therefore that the issue of the Railroad's negligence was properly one for determination by the jury.

Another and more difficult question remains for disposition, however. The trial court charged the jury in the customary form in respect to Wiles' damages. The usual evidence as to Wiles' earning power and capacity and life-expectancy was placed before it. There was medical testimony that Wiles, as a result of the three operations previously referred to, had substantial and ineradicable scars in the small of his back, and that

he had a permanent, albeit minor, back deformity as a result of the accident. The evidence discloses that an operation for spinal fusion was performed on Wiles for the purpose of producing a solid osseous bridge in his back so that it would be firm and stable. Subsequent X-rays showed that the bony material was being absorbed instead of growing and producing the solid bridge. There was also evidence that Wiles is presently employed by the Railroad as a car repairman at a larger salary than that which he was receiving at the time of the accident. But an expert medical witness, testifying on behalf of Wiles, stated that he would have difficulty in getting a job in heavy industry elsewhere than with the Railroad for most heavy-industry employers require physical examinations. Such an examination would compel Wiles to disclose the nature of his operations and that he had a history of disc protrusion and back fusion and these disclosures would militate against his securing employment.[3]

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3. In pertinent part the examination in chief on this point was as follows:

"Q. Are you familiar with the physical qualifications established by heavy industry, in the area for employment?

"A. Yes, I am.

"Q. Doctor, Mr. Wiles has testified that he is able to do his work and that he has done his work for the last eight months, I believe. But in your opinion, Doctor, in the future should he cease his employment with the Nickel Plate Railroad and were he to seek employment elsewhere, in your opinion would he be qualified or pass a physical examination for such employment in heavy industry?

* * *

"A. I believe that you would have to do some explaining before you answered this question. No. 1, with the history of disk protrusion and back fusion, generally

Appendix A.

The court submitted an interrogatory to the jury on the issue of what portion of the amount of damages, if any were awarded to Wiles, were attributable to Wiles' loss of future earning power.[4] The jury returned

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you get word from the employer that he would not want to accept this back or this case on history alone. Then, we come up to the physical properties, where I might have some judgment, but I think that that would—I mean they would not accept him if they could get someone that did not have a previous back injury. Let's put it that way. I think that is the fairest thing that I could say, to cover the problem.

"Q. And of course that is assuming, as he has testified, that he has done his work and is able to do his work at the present time?

"A. Yes, sir."

The cross-examination was as follows:

"Q. Would you say that Mr. Wiles is disqualified to perform the services in all thirty of . . . [the heavy] job classifications [of a local steel plant]?

"A. I said I tried to be fair about this. If he came as a new employee, with this history, I doubt if he would be accepted.

"Q. You doubt it. But you don't say that he would be physically disqualified?

"A. No, I didn't say that."

The re-direct examination was as follows:

"Q. Doctor, do you feel that the operative procedures that he has undergone have resulted in a disability in his back, of however minor a nature?

"A. Well, there isn't anyone who would say that anything that is repaired is as good as it was originally. . . . And there is, by the very nature of these things, naturally, some disability. But the fact that the man has returned to his work and is working very comfortably, I don't see that the disability carries into his working field."

4. The interrogatory reads:

"What amount, if any, have you awarded plaintiff for future loss of earning power?"

a verdict of $30,000 in favor of Wiles; of which $20,000 was awarded as damages because of his loss of future earning power. The court below set aside that portion of the verdict attributable to Wiles' loss of future earnings on the ground that it was "too speculative and therefore insufficient . . .". The court went on to say: "There is a complete absence of evidentiary facts on which the jury could intelligently assess the monetary difference between what plaintiff would have been able to earn in the future had he not been injured and what he will be able to earn in his physical condition during his work-life expectancy." See — F. Supp. (W.D. Pa. 19—).

We cannot agree with the conclusion reached by the court below that Wiles was not entitled to the damages awarded him by the jury for loss of future earnings. The evidence that Wiles is employed by the Railroad at a larger salary than that which he was receiving when he was injured is a facet of the issue of damages which the jury was entitled to take into consideration as was the testimony that Wiles, with his present medical history, would have difficulty under the conditions of modern industry in obtaining gainful employment in heavy work except with his present employer. Wiles is presently employed by the Railroad but this will not prevent him from being discharged or from being laid off. Because of his present employment Wiles has not yet suffered economic loss but if he cannot obtain gainful employment elsewhere he is chained to his present job in a kind of economic servitude. We cannot think that it was the intention of Congress in enacting the Federal Employers Liability Act to effect such a result. Certainly, Wiles' economic horizons have been limited

by his injury. See Bochar v. J. B. Martin Motors, Inc., 374 Pa. 240, 97 A.2d 813 (1953). See also Rice v. Philadelphia Transportation Company, 394 Pa. 454, 147 A.2d 627 (1959); Stark v. Lehigh Foundries, Inc., 388 Pa. 1, 130 A.2d 123 (1957). The availability to Wiles of the labor market for heavy-duty workers was certainly a factor which the jury was entitled to take into consideration in fixing an amount for damages due to him for loss of future earning power. The fact that Wiles would be unlikely to leave the Railroad's employment and thereby lose his seniority rights was another significant factor to be weighed by the jury. All of the factors enumerated and others were before the jury and we cannot say that there was a significantly larger element of speculation in arriving at an estimate of Wiles' loss of future earnings than there would be in any ordinary instance requiring an estimate of damages by a jury. Since none of us is capable of foreseeing the future with any substantial degree of certainty every estimate of damages must contain elements of speculation.

The order of the court below granting the Railroad's motion for a directed verdict in favor of the Railroad as to the award of $20,000 to Wiles will be reversed. The cause will be remanded with the direction to enter judgment in favor of Wiles in the amount of $30,000. The judgment will be affirmed in all other respects.

Judge Hastie, dissenting in part, would affirm the judgment below in all respects.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.